

**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

ENERGY DIVISION

ID #11874  
RESOLUTION E-4550  
February 28, 2013

**R E S O L U T I O N**

Resolution E-4550.

PROPOSED OUTCOME: This Resolution initiates a citation program authorizing Commission Staff to fine public utilities for non-compliance with Permits to Construct (PTC) and Certificates of Public Convenience and Necessity (CPCN) issued for natural gas storage facilities; electric generating plants; electric transmission/power/distribution line facilities and substations.

SAFETY CONSIDERATIONS: This resolution will provide an efficient way for the Commission to issue non-compliance fines for violations related to conditions of approval of PTC and CPCN permits, which typically include numerous safety-related conditions covering issues such as construction safety, hazardous materials safety, air and water quality, fire safety, and traffic safety.

ESTIMATED COST: None.

This Resolution is made on the Commission's own motion.

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**SUMMARY**

Commission Staff (Staff) is delegated authority to draft and issue citations and levy fines on public utilities (utilities) for non-compliance with a Permit to Construct (PTC) or Certificate of Public Convenience and Necessity (CPCN) issued for a natural gas storage facilities, electric generating plants, electric transmission/ power/ distribution line facilities, and substations. Fines will be paid by shareholders. This citation program enables staff to quickly address and

prevent situations that may threaten human beings or sensitive environmental resources.

Over the last several years the Commission has used its authority to establish citation programs in numerous areas, including gas safety; household good movers; charter party carriers; passenger stage corporations; maintenance and operation of power plants; slamming by telecommunications providers; and compliance with Resource Adequacy and Renewables Portfolio Standard requirements. This proposed resolution is consistent with other approved citation programs.

Nothing in this Resolution affects the Commission's existing Constitutional and statutory authority to pursue enforcement actions for non-compliance by public utilities with any Commission order, decision, rule, direction, or requirement.

## **BACKGROUND**

The California Environmental Quality Act (CEQA) requires that state and local agencies:

- Inform themselves of the environmental impacts of their actions;
- Disclose those impacts to the public and provide an opportunity to comment on environmental issues; and
- Avoid or reduce significant impacts when feasible.

The Commission must comply with CEQA before issuing PTCs and CPCNs for natural gas storage facilities, electric generating plants, electric transmission/ power/ distribution line facilities, and substations. When an entity applies for a PTC or CPCN, the Commission conducts an Initial Study (IS) to determine the potential environmental impacts of the proposed project. A Mitigated Negative Declaration (MND) is prepared if the project could result in significant impacts, but the impacts can be avoided or reduced to a less-than-significant level with implementation of mitigation measures. An Environmental Impact Report (EIR) is prepared for projects that may cause significant impacts that cannot be avoided or fully mitigated. Mitigation measures developed during the CEQA process are contained in a Mitigation Monitoring, Reporting, and Compliance Program (MMRCP) and adopted as conditions of the PTC or CPCN. Table 1 provides examples of adopted mitigation measures:

**Table 1**

<b>Impact Area</b>	<b>Impact</b>	<b>Mitigation Measure</b>
Air Quality	Construction-related vehicle travel on unpaved roads would result in fugitive dust emissions that would result in a violation of PM10 standards.	All on-site unpaved roads and off-site unpaved access roads shall be effectively stabilized of dust emissions using water or chemical stabilizers/suppressants.
Biological Resources	Construction activities would have a direct adverse effect on the California tiger salamander.	A preconstruction survey will be conducted each day by an on-site monitor immediately preceding construction activity that occurs within or adjacent to suitable habitat.
Transportation and Traffic	Construction would temporarily disrupt pedestrian and/or bicycle circulation and safety.	Where construction will result in temporary closures of sidewalks and other pedestrian facilities, the project proponent shall provide temporary pedestrian access, through detours or safe areas along the construction zone. Where construction activity will result in bike route or bike path closures, appropriate detours and signs shall be provided.
Noise	Construction noise would substantially disturb sensitive receptors and violate local rules, standards, and/or ordinances.	Applicant will provide notice by mail to all property owners within 300 feet of the project at least one week prior to the start of construction activities. Construction activities would occur between 7 a.m. and 7 p.m. Monday through Friday unless otherwise approved by local government.

Staff<sup>1</sup> ensure that projects comply with the specifications, mitigation measures, and conditions identified in the final decision and implemented through the MMRCPP. Staff rely on the expertise of consultants and monitors, including specialists such as biologists, to ensure compliance. Typically, Staff participate in regularly scheduled conference calls with the utilities and consultants to remain current on construction progress, follow the implementation status of mitigation measures, and discuss compliance issues. In addition, consultants to Staff provide specialists to monitor work at the project sites to ensure mitigation measures are implemented correctly and to ensure the project is being built in accordance with Commission-approved specifications.

When compliance violations occur, they are identified and reported by monitors and then documented with identified corrective actions. The purpose of the Citation Program is to reduce the number of compliance violations that occur by imposing fines when utilities fail to comply.

Examples of non-compliance:

- Continuing construction after an authorized staff person has required construction to stop;
- Starting construction components that have not been approved through a Notice to Proceed;
- Violating nest buffer zones;
- Encroachment into an exclusion zone or sensitive resource area designated for avoidance;
- Grading, foundation, line work, or other ground disturbance without required biological pre-construction surveys or biological monitor on site;
- Use of new access roads, overland travel routes, staging areas, or extra work spaces that have not been approved;
- Failure to properly maintain an erosion or sediment control structure;
- Working outside of approved work hours; and
- Project personnel working without proof of training.

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<sup>1</sup> The term "Staff" refers to the portion of the Commission's staff designated by the Executive Director to carry out the particular function involved.

Because utilities have many projects in the environmental review process or in construction, there are several different utility project managers with various levels of experience and knowledge of CPUC requirements. In addition, projects often have one or more subcontractors, who work in several different states, and may not be familiar with Commission requirements or CEQA requirements. It is important that violations be addressed immediately so that utility personnel and subcontractors will prevent future violations on their project and prevent environmental harm. A citation program will encourage utilities to adequately educate personnel on compliance requirements before and during construction.

## **DISCUSSION**

### **Need for a Citation Program**

A citation program will encourage compliance with PTC, CPCN, and MMRCF requirements (“Construction Requirements”). Non-compliance with Construction Requirements can result in irreversible environmental damage or harm to human beings or protected environmental resources. Examples include:

- Take<sup>2</sup> of an endangered or threatened species;
- Wildfire ignition;
- Exposure of sensitive receptors, such as children and the elderly, to substantial air pollutant concentrations;
- Damage to significant archaeological resources;
- Release of hazardous materials into soils or waters; and
- Helicopters dropping external loads.

As stated in Attachment A, this citation program establishes two violation levels:

- Non-compliance with Construction Requirements for natural gas storage facilities, electric generating plants, electric transmission/power/distribution line facilities, and substations that **does not** cause harm to human beings or a resource.

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<sup>2</sup> The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

- Non-compliance with Construction Requirements for natural gas storage facilities, electric generating plant, electric transmission/power/distribution line facilities, and substations that **does cause** harm to human beings or a resource.

A violation that does not result in harm to a human being or to a resource would result in a smaller fine but would still incentivize utilities to prevent non-compliance issues from recurring or continuing. A violation that does harm human beings or a resource would be result in a higher fine because of the actual harm that the violation caused. Fines will be paid by shareholders.

### **Benefits of a Citation Program Compared to Existing Tools**

Currently, Commission staff document non-compliance events in project progress reports and through non-compliance letters. Some non-compliance events require meetings with utility management to discuss corrective actions. The most serious non-compliance events may require assessing fines through an Order Instituting Investigation (OII) or halting construction through a Stop Work Order. Although the Commission currently uses these tools, non-compliance events continue to occur. For example, a dozen non-compliance events were recorded on the Sunrise Powerlink project and two Stop Work Orders were issued. The Devers Palo Verde 2 project also resulted in a dozen non-compliance events. Several concurrent non-compliance events for the Seventh Standard Substation resulted in a two year investigation and a \$100,000 fine and \$50,000 donation. A citation program will provide Staff with an additional expedited and necessary tool to correct ongoing compliance issues while project construction is underway and will conserve limited staff resources.

OIIs can take eighteen months or longer to complete, and utilities usually complete construction of a project before an OII can be completed. An OII may redress harm that has already occurred, but is not suitable to quickly address issues that occur during project construction or prevent additional violations on the project.

Substantial time and resources are required to complete an OII, and the Commission has limited staff resources. An Administrative Law Judge is assigned to each OII and hears the matter in accordance with the Commission's Rules of Practice and Procedure. This usually requires a pre-hearing conference, rulings, defining the scope and schedule, submittal of testimony and rebuttal

testimony, hearings, briefings, and the issuance of a proposed decision. A citation program standardizes the process, so that a lengthy investigative process is unnecessary.

In addition to opening an OII, Staff may issue a Stop Work Order. Stop Work Orders halt construction and are issued when a compliance violation continues over an extended period of time, is repeated several times, or when a violation could cause harm to resource. Construction personnel are typically retrained on the environmental compliance requirements of the project while work is stopped. Stop Work Orders are an effective, but limited tool. Stop Work Orders are useful when a compliance violation persists, but may not always be practical. Stop Work Orders may delay construction and increase costs to ratepayers and may only improve compliance on the specific issue rather than compliance with all requirements. It is important to provide Staff with an additional tool to increase compliance with Construction Requirements.

A citation program will often times be a more useful enforcement tool than opening an OII or issuing a Stop Work Order. Violations can be determined quickly because the decisions authorizing them contain specific conditions in the MMRCs. Non-compliance violations are fact-based and can be determined without lengthy investigation. Staff have extensive experience identifying and documenting non-compliance issues. Staff already identify and document non-compliance issues for projects, therefore, a citation program can be implemented with little additional time.

A citation program will create a financial incentive for the utilities to remain in compliance. With minimal additional Staff effort, compliance with Construction Requirements could be greatly improved, and may save Staff and utilities from future lengthy and costly investigations.

### **Authority to Establish a Citation Program**

The Commission has broad regulatory authority, as set forth in Article XII of the California Constitution and §701 of the Public Utilities Code (PU Code) which authorizes the Commission to “supervise and regulate every public utility in the State . . . and do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.”

PU Code §702 mandates that “Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in anyway relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.”

Public utilities are subject to enforcement action and fines pursuant to PU Code §§2102-2015, 2017, 2108, and 2114.

California law, including PU Code §7, authorizes the Commission to delegate certain powers to Staff, including the investigation of facts preliminary to agency action, and the assessment of specific fines for certain violations. A citation program administered by Staff for a specified violation will allow prompt action by the Commission. Over the last several years the Commission has used this authority in numerous areas, including gas safety; household good movers; charter party carriers; passenger stage corporations; maintenance and operation of power plants; slamming by telecommunications providers; and compliance with Resource Adequacy and Renewables Portfolio Standard requirements. This proposed resolution is consistent with other approved citation programs.

The issuance of a citation for a specified violation is not mandatory. In the alternative, the Commission may initiate any authorized formal proceeding or pursue any other remedy authorized by the California Constitution, the Public Utilities Code, other state or federal statutes, court decisions or decrees, or otherwise by law or in equity. Finally, the Commission’s enforcement of this Resolution by informal proceedings, formal proceedings, or otherwise, does not bar or affect the remedies otherwise available to other persons or government agencies.

## **COMMENTS**

Public Utilities Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.



The 30-day comment period for the draft of this resolution was neither waived nor reduced. Accordingly, this draft resolution was mailed to parties for comments, and will be placed on the Commission's agenda no earlier than 30 days from today.

## **FINDINGS**

1. The California Environmental Quality Act requires state and local agencies to inform themselves of the environmental impacts of their actions; disclose those impacts to the public and provide an opportunity to comment on environmental issues; and to avoid or reduce significant impacts when feasible.
2. The Commission must comply with the California Environmental Quality Act when issuing Permits to Construct and Certificates of Public Convenience and Necessity.
3. Public Utilities Code Section 702 mandates every public utility to obey and comply with every Commission order, decision, direction, or rule.
4. Utilities must comply with the requirements in Permits to Construct; Certificates of Public Convenience and Necessity; and Mitigation Monitoring, Reporting, and Compliance Programs (Construction Requirements).
5. The Commission has the power to act as an enforcement agency and to ensure that penalties are promptly prosecuted and collected pursuant to Public Utilities Code Section 2101.
6. Public utilities are subject to Commission enforcement action and penalties pursuant to Public Utilities Code Sections 2102-2105, 2017, 2108 and 2114.
7. Under California law, including Public Utilities Code Section 7, the Commission may delegate authority to its Staff to perform certain functions.

8. Delegation of authority to Commission Staff to issue citations and levy Scheduled Fines for Specified Violations will encourage compliance with Construction Requirements.
9. A citation program will provide the timely remedy necessary to correct ongoing compliance issues while project construction is underway and will conserve limited staff resources.
10. A citation program will incentivize utilities to prevent non-compliance issues from recurring or continuing.
11. The Scheduled Fines set forth in Appendix A are reasonable and will encourage compliance with Construction Requirements.
12. The proposed procedures for the citation program ensure due process, fairness, and efficiency in the application of the citation program.

**THEREFORE IT IS ORDERED THAT:**

1. The citation program and the Scheduled Fines for the Specified Violations as described in Appendix A, are hereby adopted.
2. Authority is delegated to Commission Staff to issue citations and levy Scheduled Fines for the Specified Violations set forth in Appendix A to enforce compliance with Permits to Construct and Certificates of Public Convenience and Necessity.
3. Fines will be paid by shareholders.
4. The issuance of a citation for a Specified Violation is not mandatory, and, in the alternative, the Commission may initiate any formal proceeding authorized by the California Constitution, the Public Utilities Code, other state and federal statutes, court decisions or decrees, the Commission's Rules of Practice and Procedure, or prior Commission orders, decisions, rules, directions, demands or requirements, and pursue any other remedy authorized by the

California Constitution, the Public Utilities Code, other state or federal statutes, court decisions or decrees, or otherwise by law or in equity.

5. Nothing in this Resolution bars or affects the rights or remedies otherwise available to other persons or government agencies.
6. Resolution E-4550 is enacted.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on February 28, 2013; the following Commissioners voting favorably thereon:

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PAUL CLANON  
Executive Director

## APPENDIX A

### **Permit to Construct and Certificate of Public Convenience and Necessity Citation Program**

#### 1.0 Specified Violations and Scheduled Fines

1.1 “Specified Violation” means the failure to comply with Construction Requirements<sup>3</sup> for natural gas storage facilities; electric generating plants; electric transmission/ power/ distribution line facilities or substations. This includes failure to implement the mitigation measures in the project’s environmental document (e.g. Environmental Impact Report, Mitigated Negative Declaration), adopted as part of the final decision, or making unauthorized project changes (e.g. moving work areas without Commission approval).

1.2 “Scheduled Fines” for Specified Violations are set forth in Appendix A.

1.3 Modification of Scheduled Fines. Scheduled Fines may be modified by Resolution.

#### 2.0 Procedures for the Citation Program

2.1 Citations for Specified Violations. After appropriate informal investigation and verification that a Specified Violation defined in this Resolution has occurred, Commission Staff is authorized to issue a citation. The Specified Violations and the corresponding Scheduled Fine that may be levied are described in this Appendix.

2.2 Service of Citations. Citations shall be sent by Commission Staff by first class mail to the Respondent at the address of the agent for service of process.

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<sup>3</sup> Requirements in a Permit to Construct; Certificate of Public Convenience and Necessity; or Mitigation Monitoring, Reporting, and Compliance Program.

2.3 Content of Citations. Citations shall state the alleged violation, the evidence supporting the alleged violation, and the proposed Scheduled Fine. The citation may summarize the evidence and Commission Staff shall make the evidence available for timely inspection upon request by the Respondent. Citations also shall include an explanation of how to file an appeal of the citation, including the explanation of a right to have a hearing, to have a representative present at the hearing, and to request a transcript.

2.4 Response to Citation. A Respondent may either: (1) accept the citation and the Scheduled Fine; or (2) appeal the citation.

2.5 Filing with Commission Staff. Unless otherwise specified, “notify Commission Staff,” “filing,” or “file” means to send a written communication by the U.S. Mail or an express mail service to the address specified in the order or citation that requires the filing or notification. These written communications are not filed with the Commission’s Docket Office. In addition to or instead of communications by mail service, Commission Staff may allow electronic submissions.

2.6 Acceptance of Scheduled Fine. In the event the proposed Scheduled Fine is accepted, the Respondent shall notify Commission Staff in writing and shall pay the Fine in full as set forth in subsection 2.8, below within thirty (30) days of the service date of the citation.

2.7 Appeal of Citation. In lieu of accepting the Scheduled Fine, a Respondent may appeal the citation and request a hearing. In the event of an appeal, any remedy available may be imposed, and the remedy shall not be mandated by or limited to the Scheduled Fine.

2.7.1. Notice of Appeal. To appeal a citation, the Respondent must file a written Notice of Appeal. The Notice of Appeal must state the grounds for appeal and be filed with Commission Staff within thirty (30) days of the date of the citation.

2.7.2. Referral to Administrative Law Judge. Upon receipt of a timely Notice of Appeal, Commission Staff shall promptly provide a copy of the Notice of Appeal to the Chief Administrative Law Judge. The Chief Administrative Law Judge shall promptly designate an Administrative Law Judge to hear the appeal.

2.7.3 Time of Hearing. No less than ten (10) days after the Notice of Appeal is filed, the assigned Administrative Law Judge shall set the matter for hearing promptly. The Administrative Law Judge, may, for good cause shown or upon agreement of the parties, grant a reasonable continuance of the hearing.

2.7.4 Location of Hearing. Appeals of citations shall be heard in the Commission's San Francisco courtroom on regularly scheduled days.

2.7.5 Transcripts. The Respondent may order a transcript of the hearing, and shall pay the cost of the transcript in accordance with the Commission's specified procedures.

2.7.6 Representation at Hearing. The Respondent may be represented at the hearing by an attorney or other representative, but any such representation shall be at the Respondent's expense.

2.7.7. Evidentiary Hearing. At an evidentiary hearing, Commission Staff bears the burden of proof and, accordingly, shall open and close. The Administrative Law Judge may, in his or her discretion to better ascertain the truth, alter the order of presentation. Formal rules of evidence do not necessarily apply, and all relevant and reliable evidence may be received at the discretion of the Administrative Law Judge.

2.7.8 Submission. Ordinarily, the matter shall be submitted at the close of the hearing. The Administrative Law Judge, upon a showing of good cause, may keep the record open for a reasonable period to permit a party to submit additional evidence or argument.

2.7.9 Decision. The Administrative Law Judge shall issue a draft Resolution resolving the appeal not later than thirty (30) days after the appeal is submitted in accordance with subsection 2.7.8, and the draft Resolution shall be placed on the first available agenda, consistent with the Commission's applicable rules.

2.7.10 Communications. From the date that a citation is issued to and including the date when the final decision is issued, neither the Respondent nor Commission Staff, or any agent or other person on behalf of the Respondent or Commission Staff, may communicate regarding the appeal, orally or in writing, with a Commissioner, Commissioner's advisor, or Administrative Law Judge.

2.8 Payment of Scheduled Fines. Payment of Scheduled Fines shall be submitted to the Commission's Fiscal Office, 505 Van Ness Avenue, San Francisco, CA 94102, in the form of certified check, payable to the Public Utilities Commission for the credit of the State General Fund.

2.9 Default. If the Respondent: (a) notifies Commission Staff of acceptance of a Scheduled Fine and fails to pay the full amount of the Scheduled Fine within thirty (30) days of the date of the written acceptance of the Scheduled Fine; or (b) fails to notify Commission Staff of acceptance of a Scheduled Fine or fails to file a written Notice of Appeal in the manner and time required, then the citation and fine shall become final and the Respondent is in default. Upon default, any unpaid balance of a Scheduled Fine shall accrue interest at the legal rate of interest for judgments, and Commission Staff and the Commission may take any action provided by law to recover unpaid penalties and ensure compliance with applicable statutes and Commission orders, decisions, rules, directions, demands or requirements.

2.10 Reporting. Commission Staff shall regularly report to the Commission summarizing actions taken pursuant to this Resolution. The report shall include a summary of the citations and penalties imposed, fines paid, and the disposition of any appeals.

## SPECIFIED VIOLATIONS AND SCHEDULED FINES

SPECIFIED VIOLATION	SCHEDULED FINE
Non-compliance with Construction Requirements for natural gas storage facilities, electric generating plants, electric transmission/ power/ distribution line facilities, and substations that does not cause harm to human beings or a resource.	\$500 per day for the first ten days the non-compliance occurred and \$1,000 for each day thereafter.
Non-compliance with Construction Requirements for natural gas storage facilities, electric generating plants, electric transmission/ power/ distribution line facilities, and substations that does cause harm to human beings or a resource.	\$5,000 per day for the first ten days the non-compliance occurred and \$10,000 for each day thereafter.